Thavanathan a/l Balasubramaniam v Majlis Peguam Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 17B–99 OF 2002
ZALEHA ZAHARI, MD RAUS AND WAN ADNAN MUHAMAD JJ
2 JUNE 2003

Legal Profession *— Professional discipline — Appropriate penalty — Appellant appealed against decision of disciplinary board in striking appellant off the Roll of Advocates and Solicitors — Appellant convicted on charge of accepting gratification whilst serving as magistrate — Whether misconduct committed by appellant serious — Whether punishment imposed appropriate — Legal Profession Act 1976 s 103D(3)*

On 28 November 1992, whilst the appellant was serving as a magistrate at the magistrates' court in Kuala Lumpur, he was charged on two counts of accepting gratification punishable under s 4(a) of the Prevention of Corruption Act 1961. The appellant was acquitted and discharged by the sessions court at the end of the prosecution case. On appeal by the prosecution, the High Court dismissed the appellant's acquittal in respect of the first charge, but allowed the appeal in respect of the second charge of corruptly accepting gratification of RM15,000. Upon the case reverting back to the sessions court, the appellant was once again acquitted and discharged by the sessions court judge. Again, the prosecution appealed against the acquittal and discharge. The High Court subsequently convicted the appellant and sentenced him to three years' imprisonment and fined him a sum of RM5,000 in default 12 months' imprisonment. The appellant appealed against the conviction and sentence. On 21 March 1997, the Supreme Court dismissed the appellant's appeal, upheld the High Court's decision on conviction and sentence of imprisonment, but set aside the fine of RM5,000 imposed. The appellant had since served out the sentence of imprisonment imposed against him. On 29 June 1999, the Bar Council lodged a complaint under s 94(30)(a) of the Legal Profession Act 1976 ('the Act') arising from the conviction and sentence recorded against the appellant. Upon receipt of this letter, the appellant questioned the legality of the institution of the disciplinary proceedings against him on the ground that he was not in possession of a 'sijil annual' or practicing certificate at the time of commission of the offence of which he was convicted. Notwithstanding this challenge, on 21 November 2000, a s 101(4) notice of the Act was issued against the appellant asking him to give a written explanation within 14 days and whether he was desirous of being heard. Pending the disposal of the disciplinary action instituted against the appellant, the respondent issued the appellant a 'sijil annual' on 14 December 2000, on a without prejudice basis of their right to complain against him. An investigating tribunal was subsequently appointed by the disciplinary board. It held its inquiry on 14 December 2000 and recommended that a formal investigation by a disciplinary committee be carried out. Following this, a

disciplinary committee was then convened. The disciplinary committee recommended that the appellant be suspended for a period of six months. The disciplinary board disagreed with the recommendation of the disciplinary committee and by an order dated 12 June 2002 made pursuant to the powers conferred by s 103D(3) of the Act, the disciplinary board directed that the appellant be struck off the Roll of Advocates and Solicitors ('the Roll') of the High Court of Malaya ('the said order'). This was the appellant's appeal against the said order.

Held, dismissing the appeal:

(1) The primary issue in determining the sanction to be imposed on the appellant was whether the misconduct committed by the appellant was serious or otherwise. In the instant case, the misconduct committed by the appellant was serious because a person involved in the administration of justice must, at all times, conduct himself with unimpeachable integrity, honesty, impartiality and propriety. By the conviction recorded against him, the appellant had been shown to be wanting in all of the abovementioned qualities. The appellant had been found to have acted dishonestly, he had abused and breached the trust emplaced upon him and had fallen well below the required standards of integrity, probity and trustworthiness (see p 349E–F, H).

(2) Even if the High Court were to accept the appellant counsel's submission that the appellant's misconduct was a professional misconduct committed outside of the legal profession by reason of the fact that he was not a practicing advocate and solicitor at the time of commission of the offence, the fact that the appellant was a judicial officer at that point of time was a factor to be construed against him, rather than as a mitigating factor in his favor (see pp 349I–350A).

(3) The doctrine of equality embodied in the Constitution which was aimed at striking out at arbitrariness applied equally to punishment imposed in disciplinary cases. Decisions made by the disciplinary board should not be arbitrary but must be based on some rational and relevant principle which was not discriminatory. The High Court too, when sitting on appeal against decisions of the disciplinary board, was duty bound to give equal treatment to persons who were placed in like position. As such, a decision on this issue called for an examination and scrutiny of the facts of other comparable cases. Upon careful scrutiny of the punishment imposed by the disciplinary board in respect of other cases, there was ample material to distinguish the facts of the present case from those cases that were the beneficiaries of indulgence of the disciplinary board. The main distinguishing feature was that the misconduct in this case was committed by an officer acting in a judicial capacity and this

merited a more severe sanction. Further, where the misconduct involved the element of dishonesty, the disciplinary board had been consistent in directing the person concerned to be struck off the Roll (see pp 350H–351A, F–H).

(4) Although factors such as the age of appellant when he was charged with the offence, his remorse over the matter and the fact that he had an aged mother to care for were pertinent as mitigating factors in sentencing in criminal case, the order meted out by the disciplinary board was not primarily directed to punishment but equally important, the need to maintain public confidence in the trustworthiness of all members of the legal profession. The court agreed with the stand taken by the disciplinary board that the discharge of professional duty by a person involved in the administration of justice with less than complete integrity such as that committed by the appellant warranted the most severe sanction. The professional misconduct of which the appellant had been found to be guilty of was of such a nature that the highest penalty should be imposed and that the appellant was unfit to remain a member of this honorable profession (see p 352A–D).

[Bahasa Malaysia summary

Pada 28 November 1992, semasa perayu bertugas sebagai seorang majistret di mahkamah majistret di Kuala Lumpur, beliau dituduh atas dua tuduhan menerima rasuah yang boleh dihukum di bawah s 4(a) Akta Pencegahan Rasuah 1961. Perayu telah dibebas dan dilepaskan oleh mahkamah sesyen di akhir kes pendakwaan. Semasa rayuan oleh pihak pendakwa, Mahkamah Tinggi telah menolak pembebasan perayu berhubung pertuduhan pertama, tetapi telah membenarkan rayuan berhubung pertuduhan kedua iaitu menerima rasuah sebanyak RM15,000. Apabila kes tersebut dikembalikan ke mahkamah sesyen, perayu sekali lagi telah dibebas dan dilepaskan oleh hekima mahkamah sesyen. Sekali lagi, pihak pendakwa telah merayu terhadap pembebasan dan pelepasan tersebut. Mahkamah Tinggi seterusnya telah menyabitkan perayu dan menjatuhkan hukuman tiga tahun penjara dan denda beliau sejumlah RM5,000 jika gagal 12 bulan penjara ke atas beliau. Perayu telah merayu terhadap sabitan dan hukuman tersebut. Pada 21 Mac 1997, Mahkamah Agong telah menolak rayuan perayu, mengekalkan keputusan Mahkamah Tinggi berhubung sabitan dan hukuman penjara, tetapi mengenepikan denda RM5,000 yang dikenakan. Perayu telah menjalani hukuman penjara yang dikenakan ke atas beliau. Pada 29 Jun 1999, Majlis Peguam telah membuat aduan di bawah s 94(30)(a) Akta Profesyen Undang-Undang 1976 ('Akta tersebut') yang timbul daripada sabitan dan hukuman yang direkodkan terhadap perayu. Setelah menerima surat ini, perayu telah mempersoalkan kesahihan pemulaan prosiding tatatertib terhadap beliau atas alasan bahawa

beliau tidak memiliki 'sijil annual' atau sijil amalan pada masa kesalahan berlaku yang beliau disabitkan. Meskipun terdapat cabaran ini, pada 21 November 2000, satu notis s 101(4) Akta tersebut telah dikeluarkan terhadap perayu meminta beliau memberikan satu penjelasan bertulis dalam tempoh 14 hari dan sama ada beliau ingin didengar. Sementara menunggu tindakan tatatertib dimulakan terhadap perayu, responden telah memberikan perayu satu 'sijil annual' pada 14 Disember 2000, atas dasar tanpa prejudis hak mereka untuk mengadu terhadap beliau. Satu tribunal siasatan kemudiannya telah dilantik oleh lembaga tatatertib. Ia telah mengadakan siasatan pada 14 Disember 2000 dan mencadangkan satu jawatankuasa tatatertib dijalankan. Berikutan ini, satu jawatankuasa tatatertib telah bersidang. Jawatankuasa tatatertib tersebut telah mencadangkan bahawa perayu digantung untuk satu tempoh enam bulan. Lembaga tatatertib tidak bersetuju dengan cadangan jawatankuasa tatatertib tersebut dan melalui satu perintah bertarikh 12 Jun 2002 yang dibuat menurut kuasa-kuasa yang diberikan oleh s 103D(3) Akta tersebut, lembaga tatatertib telah mengarahkan perayu dikeluarkan dari Senarai Peguambela dan Peguamcara ('Senarai tersebut') di Mahkamah Tinggi Malaya ('perintah tersebut'). Ini rayuan perayu terhadap perintah tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Persoalan utama untuk menentukan sanksi dikenakan ke atas perayu adalah sama ada salah laku yang dilakukan oleh perayu adalah serius atau sebaliknya. Dalam kes semasa, salah laku yang dilakukan oleh perayu adalah serius kerana seseorang yang terlibat dalam pentadbiran keadilan hendaklah, pada setiap masa, mengendalikan dirinya dengan sikap integriti, jujur, adil dan kesopanan yang tidak disangsikan. Melalui satu sabitan yang direkodkan terhadap beliau, perayu tidak mencerminkan mana-mana daripada kualiti-kualiti yang tersebut di atas. Perayu didapati telah bertindak secara tidak jujur, beliau telah menyalahguna dan mengingkari kepercayaan yang diletakkan ke atas beliau dan tidak memenuhi standard integriti, kejujuran yang tidak diragui dan kebolehpercayaan yang dikehendaki dari beliau (lihat ms 349E–F, H).

(2) Walaupun Mahkamah Tinggi menerima hujah peguam perayu bahawa salah laku perayu adalah satu salah laku profesional oleh sebab fakta bahawa beliau bukan seorang peguambela dan peguamcara yang beramal pada masa kesalahan dilakukan, hakikat bahawa perayu adalah seorang pegawai kehakiman pada masa tersebut adalah satu faktor yang perlu ditafsirkan terhadap beliau, dan bukan sebagai satu faktor peringanan yang menyebelahi pihak beliau (lihat ms 349I–350A).

(3) Doktrin kesamarataan dalam Perlembagaan bertujuan untuk menghapuskan cara 'arbitrariness' sama terpakai kepada

hukuman yang dikenakan dalam kes-kes tatatertib. Keputusan-keputusan yang dibuat oleh lembaga tatatertib tidak boleh sembarangan dan mestilah berdasarkan prinsip yang rasional dan relevan yang tidak berdiskriminasi. Mahkamah Tinggi juga, semasa bersidang atas rayuan terhadap keputusan-keputusan lembaga tatatertib, adalah terikat untuk memberikan layanan yang sama kepada mereka yang berada dalam kedudukan yang sama. Oleh itu, satu keputusan tentang persoalan ini perlu satu pemeriksaan dan penelitian fakta-fakta kes-kes lain yang sama. Setelah penelitian dibuat ke atas hukuman yang dikenakan oleh lembaga tatatertib berhubung kes-kes lain, masih terdapat bahan yang mencukupi untuk membezakan fakta-fakta kes semasa dengan kes-kes yang merupakan kegemaran lembaga tatatertib. Sifat utama yang berbezakan adalah salah laku dalam kes ini telah dilakukan oleh seorang pegawai yang bertindak dalam kapasiti kehakiman dan ini memeritkan satu sanksi yang berat. Tambahan pula, di mana salah laku melibatkan elemen ketidakjujuran, lembaga tatatertib adalah konsisten dalam mengerahkan seseorang yang telribat itu dikeluarkan dari Senarai tersebut (lihat ms 350H–351A, F–H).

(4) Walaupun faktor-faktor seperti umur perayu semasa beliau dituduh dengan kesalahan tersebut, kekesalan beliau atas pekara tersebut dan hakikat bahawa beliau mempunyai seorang ibu tua yang perlu dijaga adalah berkaitan dengan faktor-faktor peringanan dalam menjatuhkan hukuman dalam kes jenayah, perintah yang diberikan oleh lembaga tatatertib bukan terutamanya bertujuan untuk menghukum tetapi yang sama pentingnya, perlunya untuk mengekalkan keyakinan orang awam terhadap kebolehpercayaan semua ahli-ahli profesyen undang-undang. Mahkamah bersetuju dengan pendirian yang diambil oleh lembaga tatatertib bahawa pelepasan kewajipan profesional oleh seseorang yang terlibat dalam pentadbiran keadilan dengan integriti yang rendah seperti yang dilakukan oleh perayu mewarankan sanksi yang berat. Salah laku profesional yang perayu didapati bersalah bersifat sedemikian sehingga memerlukan satu penalti berat dikenakan dan perayu tidak sesuai lagi dikekalkan sebagai seorang ahli dalam profesyen ini (lihat ms 352A–D).]

Notes

For cases on appropriate penalties, see 9 *Mallal's Digest* (4th Ed, 1999 Reissue) para 1692.

Cases referred to

PP v Thavananthan [1994] 2 MLJ 436 (refd)

Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401 (refd)

Legislation referred to

Federal Constitution art 8
Legal Profession Act 1976 ss 94(30)(a), 101(4), 103D(3)
Official Secrets Act 1972
Prevention of Corruption Act 1961 ss 4(a), 12

D Kalaimany (*Kalai & Partners*) for the appellant.
Eileen Soraya bt Datuk Seri Raja Aman (*Raja Darryl & Loh*) for the respondent.

Zaleha Zahari J (delivering judgment of the court): By order dated 12 June 2002, pursuant to the powers conferred by s 103D(3) of the Legal Profession Act 1976 ('the Act'), the disciplinary board directed that Thavanathan a/l Balasubramaniam ('the appellant') be struck off the Roll of Advocates and Solicitors of the High Court of Malaya ('the said order'). This is an appeal against the said order.

This appeal also involves procedural points. Be that as it may, on 9 November 2002, midway through the appellant counsel's submission, the court was informed that both parties had agreed to narrow down the issues and that arguments would be confined to the propriety of the punishment imposed against the appellant having regard to the background facts and circumstances of this case.

BACKGROUND

The background facts are not in issue and are as follows.

The conviction

The appellant was admitted to the Malaysian Bar in August 1989. A few months later, in December 1989, he joined the Judicial and Legal Service.

On 28 November 1992, whilst serving as a magistrate at the Magistrate's Court, Jalan Duta, Kuala Lumpur, the appellant was charged on two counts of accepting gratification punishable under s 4(a) of the Prevention of Corruption Act 1961.

The appellant was acquitted and discharged by the sessions court at the end of the prosecution case. On appeal by the prosecution, the High Court dismissed the appellant's acquittal in respect of the first charge, but allowed the appeal in respect of the second charge of corruptly accepting gratification of RM15,000. The learned judge was of the view that there was sufficient evidence at the close of the prosecution case to call for defence in respect of the second charge preferred against the appellant.

Upon the case reverting back to the sessions court, on 25 September 1994, the appellant was once again acquitted and discharged by the sessions court judge. The prosecution appealed against the acquittal and discharge.

On 25 April 1994, the High Court allowed the prosecution's appeal, set aside the order of discharge and acquittal, found the appellant guilty, convicted him of the charge of corruptly accepting gratification of

A RM15,000 and sentenced him to three years' imprisonment and fined him RM5,000 in default 12 months. The reasoning of the High Court in arriving at these conclusions is as reported in *PP v Thavananthan* [1994] 2 MLJ 436. The appellant appealed against the conviction and sentence recorded against him.

B Thereafter, on 21 March 1997, the Supreme Court dismissed the appellant's appeal, upheld the High Court's decision on conviction and sentence of imprisonment, but set aside the fine of RM5,000 imposed. The reasoning of the Supreme Court in arriving at these conclusions is as reported in *Thavanathan a/l Balasubramaniam v PP* [1997] 2 MLJ 401.

C The appellant has since served out the sentence of imprisonment imposed against him.

The disciplinary action

On 29 June 1999, the Bar Council lodged a complaint under s 94(3)(a) of the Act arising from the conviction and sentence recorded against the D appellant.

Upon receipt of this letter, by letter dated 13 September 1999, the appellant questioned the legality of the institution of the disciplinary proceedings against him on the ground that he was not in possession of a sijil annual/ practicing certificate at the time of commission of the offence of E which he was convicted. Notwithstanding this challenge, on 21 November 2000, a s 101(4) notice of the Act was issued against him by which notice the appellant was asked to give a written explanation within 14 days and whether he was desirous of being heard.

It is common ground that, pending the disposal of the disciplinary action instituted against the appellant, the respondent issued the appellant F a 'sijil annual' on 14 December 2000, on a 'without prejudice' basis of their right to complain against him.

An investigating tribunal was subsequently appointed by the disciplinary board. It held its inquiry on 14 December 2000 and recommended that a formal investigation by a disciplinary committee be G carried out. Following this, a disciplinary committee was then convened. The disciplinary committee submitted their recommendations to the disciplinary Board as held out at pp 82–83 of the appeal record. Upon comparison of the appellant's case with the cases listed therein, the disciplinary committee recommended that the appellant be suspended for a period of six months.

H On 7 June 2002, the disciplinary board, in exercise of the powers conferred by s 103D(3) of the Act disagreed with the recommendation of the disciplinary committee and instead directed the appellant to be struck off the Rolls. The appellant then lodged this appeal.

I *The appellant counsel's submissions*

Mr Kalaimany was of the view that the misconduct committed by the appellant upon which the disciplinary action was grounded was not serious.

According to him the imposition of the punishment imposed by the disciplinary board, different from the cases referred to as comparison, and contrary to that recommended by the disciplinary committee, was unjustified and violative of the equality provision conferred by art 8 of the Federal Constitution. The appellant counsel was of the view that the appellant had been discriminated when contrasted with decisions made in earlier disciplinary decisions, to wit, that taken against Gooi Soon Seng and Phang Ah Hee. According to the appellant's counsel, these two cases were in the same class as the appellant's and merited the same punishment.

He was further of the view that as the misconduct which formed the basis of the disciplinary action was committed when the appellant was a magistrate, this was a misconduct committed outside the profession, and accordingly merited a lenient punishment.

This court was also urged to exercise leniency for the following reasons. He stressed the fact that the appellant had been suspended from public office since 28 November 1992 until 21 March 1997. The appellant had served out the sentence of imprisonment imposed him. The anguish and the mental agony and humiliation which the appellant had undergone throughout this period, and the fact that the appellant would be stigmatized for life arising from the conviction, were mitigating factors which this court should take into consideration in favour of the appellant in determining the sanction that should be imposed.

According to the appellant's counsel, the facts of this case does not warrant the imposition of the severest punishment of depriving the appellant of his livelihood, which sanction should be reserved only for the gravest offence, of which this is not such a case. He pointed out that the appellant had gained nothing from his misconduct.

Pending the disposal of the disciplinary action instituted against the appellant, upon issuance of the 'sijil annual', the appellant had practiced as an Advocate and Solicitor with Messrs Ananthan and Partners and there has been no further complaint lodged against him. Currently the appellant has been offered a job as a legal assistant by Messrs JJ Naidu.

The appellant counsel also highlighted the fact that the appellant is supporting his 70 year old mother who is suffering from liver sclerosis.

He accordingly urged this court to allow the appeal and vary the disciplinary board's decision.

The respondent counsel's submissions

The respondent counsel highlighted the fact that the offence in this case was committed whilst the appellant was serving in a judicial capacity. According to her, the closest comparison in respect of the misconduct and punishment imposed is that of the action taken against Wong Kim Fatt who was struck off the Rolls.

She was of the view that, in circumstances such as these, the respondent should be allowed to regulate itself and that this was not an appropriate case for the court to interfere. She also pointed out that it was open for an

A Advocate and Solicitor subject to a striking out order to reapply to be enrolled as was done in Wong Kim Fatt's case.

In relation to the issuance of the practicing certificate to the appellant pending disposal of the disciplinary action against him, this should not be held out against the respondent for two reasons, ie because the respondent had no power to withhold the same based on the court's decision in Mahinder Singh's case; secondly, by reason of the fact that it was issued on a 'without prejudice' basis.

She accordingly urged this court to dismiss the appeal and uphold the punishment imposed on the appellant.

C FINDINGS

In view of the agreement between both parties that the consideration of this appeal be confined on the issue of the appropriateness of the punishment imposed, we consider it is unnecessary for this court to rule on the technical point of the failure by the disciplinary board to give reasons.

D As to the effect of the respondent issuing a practicing certificate to the appellant pending the disposal of the disciplinary action instituted against him, this factor would be considered only in the context of punishment to be imposed, not in the context of the jurisdiction to institute the disciplinary proceedings against the appellant.

E In our view, the primary issue in determining what sanction should be imposed on the appellant is whether the misconduct committed by the appellant was serious or otherwise. The appellant counsel had submitted that the misconduct committed by the appellant was not serious.

We hold otherwise for the following reasons. We subscribe to the view that a person involved in the administration of justice must, at all times, conduct himself with unimpeachable integrity, honesty, impartiality and propriety. Integrity connotes honesty as well as strong moral values and encompasses within it the virtues of truthfulness. It is incumbent upon a Magistrate at all times to decide cases before him impartially in an unbiased manner. A Magistrate cannot adjudicate upon a matter in which he has a personal interest. Justice must be dispensed without fear or favour. These are all qualities which must be strictly adhered to by a person acting in a judicial capacity.

Further, in exercise of its criminal jurisdiction, when offences have been committed, public interest demands that justice to be meted out to the wrongdoer in accordance with law.

H By the conviction recorded against him the appellant has been shown to have been found wanting in all of the abovementioned qualities. The appellant has been found to have acted dishonestly, he had abused and breached the trust emplaced upon him and had fallen well below the required standards of integrity, probity and trustworthiness.

I Even if this court were to accept the appellant counsel's submission that the appellant's misconduct was a professional misconduct committed outside of the profession by reason of the fact that he was not a practicing

advocate and solicitor at the time of commission of the offence, we hold that the fact that the appellant was a judicial officer at that point of time was a factor to be construed against him, rather than as a mitigating factor in his favor. A

Thus, having regard to the background facts of the appellant's conviction, we are not in agreement with the appellant counsel's submission that the misconduct committed by the appellant was not serious but instead hold that the appellant had committed a serious offence. B

As to the fact that arising from the criminal charge, trial and conviction the appellant had undergone severe stress and mental agony for a somewhat lengthy period from 1992 to 1997, and the contention that the appellant had undergone sufficient punishment, and for this court accept these as mitigating factors, our observation on the time frame taken to dispose of the proceedings taken against the appellant arising from his misconduct are these. C

We note that the criminal case and disciplinary action taken against Gooi Soon Seng and that Phang Ah Hee appeared to have been expeditiously disposed of by reason of their plea of guilt to the respective charge preferred against them and that this accordingly has lead to a saving of judicial time and expense. It may well be that, by reason of their plea of guilt (which is a mitigating factor to be taken in sentencing in criminal cases), a some what lenient sentence were imposed by the court on each of them. Following this, it is accordingly not surprising that the punishment imposed by the disciplinary board ensuing from the conviction recorded and light sentence imposed against them, were somewhat lenient. D E

This clearly contrasts with the stand taken by the appellant who chose to challenge each and every step of the way, be it that of the criminal case, right up to the respondent's jurisdiction to institute disciplinary proceedings after having served out his sentence of imprisonment. The conduct and stand taken by the appellant had clearly contributed to the lengthy time frame of this matter 'hanging' over the appellant's head. F

In our considered opinion, the lengthy time frame taken was not necessarily a mitigating factor for leniency in the appellant's favour but is a neutral factor. Be that as it may we would like to expressly place on record that we are not holding the fact that the appellant took the issues and made the challenges that he did, against him. G

On the issue of alleged discrimination and inequality of treatment on the part of the disciplinary board, our views are as follows. We agree with the appellant's counsel submission that the doctrine of equality embodied in the Constitution which is aimed at striking out at arbitrariness applies equally to punishment imposed in disciplinary cases. We fully endorse and subscribe to the view that similarly placed persons should be given equality of treatment. That decisions made by the disciplinary board should not be arbitrary but must be based on some rational and relevant principle which is not discriminatory. This court too, when sitting on appeal against decisions of the disciplinary board, is duty bound to give equal treatment to persons who are placed in like position. A decision on this issue calls for an H I

examination and scrutiny of the facts of the cases referred to us for comparison.

Upon careful scrutiny of the punishment imposed by the disciplinary board in respect of earlier decisions referred to for our attention, we took note of the following:

(a) Gooi Soon Seng was a deputy public prosecutor (who, like the appellant, was also a member of the Judicial and Legal Service) at the time of the time of commission of the offence. He was convicted under s 12 of the Prevention of Corruption Act 1961, (ie that of not reporting a corruption). He was sentenced to one day's imprisonment and fined RM500 following which he was suspended for three months in 1999 and is currently in practice.

(b) Phang Ah Hee was also a deputy public prosecutor. He was convicted under the Official Secrets Act 1972, sentenced to six months' imprisonment and fined RM1,000. He was subsequently suspended from practice for a period of 15 months' in 1988 and is currently in practice.

(c) Wong Kim Fatt was a judicial commissioner of the High Court. He was found guilty of criminal breach of trust of misappropriating RM15,500 and was struck off the rolls in 1984. He applied to be restored in 1987 and is currently in practice.

(d) Rashid Ali Sickender was convicted of criminal breach of trust of RM113,000 and sentenced to ten months imprisonment. He was struck off the Rolls in 1990 and was restored and resumed practice in 1997.

(e) P Gnanasegaran, involving misappropriation of RM133,000 was struck off the Rolls on 22 July 2002.

From the facts of the cases referred to us for comparison, we are of the considered opinion that there were ample material to distinguish the facts of the present case from those cases that were the beneficiaries of indulgence of the disciplinary board.

We are not in agreement that the yardstick of punishment to be used against the appellant to be that as applied in Gooi and Phang. In our view, the main distinguishing feature, that the misconduct in this case was committed by an officer acting in a judicial capacity, merits a more severe sanction. In any event, the charge of non-reporting an offence with which Gooi was convicted of was not as serious as that committed by the appellant. Likewise, the charge against Phang.

The court further notes that from the cases referred to us as comparison, where the misconduct involves the element of dishonesty, the disciplinary board has been consistent in directing the person concerned be struck off the Rolls. We accordingly are in agreement with the respondent counsel that, of the cases referred to for comparison, the closest case is that of the action taken against Wong Kim Fatt who was struck of the Rolls.

As to the stigma which the appellant has to bear arising from the conviction recorded against him, the fact that the appellant was young when

he was charged of the offence (then 27/28 years old and now 38 years old), that the appellant feels remorse for his young days as a magistrate, as well as the fact that the appellant has an aged mother to care for, and that this court give him another chance to relive his life and career in the profession as an advocate and solicitor, we are of the view that he should have thought of all these before committing the act, and not after.

Further, although these factors are pertinent as mitigating factors in sentencing in criminal case, this court has to bear in mind that disciplinary board orders are not primarily directed to punishment but equally important, the need to maintain public confidence in the trustworthiness of all members of the legal profession.

We fully endorse the stand taken by the disciplinary board that the discharge of professional duty by a person involved in the administration of justice with less than complete integrity such as that committed by the appellant warrants the most severe sanction. We fully agree that the professional misconduct of which the appellant has been found to be guilty of is of such a nature that the highest penalty should be imposed and that the appellant is unfit to remain a member of this honorable profession. It is open to him to seek to apply to be re-enrolled after a sufficient time lapse as was done in Wong Kim Fatt's case.

In conclusion we hold that this case was correctly decided. The appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Reported by Lim Lee Na